

05-550 OCT 25 2005

No. \_\_\_\_\_ OFFICE OF THE CLERK  
IN THE  
Supreme Court of the United States

NEIL PATTERSON, JR.,

*Petitioner,*

v.

NEW YORK,

*Respondent*

ON PETITION FOR A WRIT  
OF CERTIORARI TO THE  
NEW YORK COURT OF  
APPEALS

PETITION FOR A WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

Neil Patterson, Jr., an enrolled member of the Tuscarora Indian Nation, a federally recognized Indian tribe and one of the Six Nations of the Iroquois Confederacy, hereby petitions for the issuance of a writ of certiorari to restore Tuscarora treaty fishing rights to the lands that currently comprise Wilson Tuscarora State Park in New York State. Compelling reasons exist to grant the requested writ because the New York State Court of Appeals has decided important federal questions in a way that conflicts with relevant decisions of this Court. The following questions are presented for review:

1. Whether the Tuscarora Nation's fishing rights reserved in the Treaty of Canandaigua of 1794 are wholly derived from and dependent upon continued ownership of the lands by the Seneca Nation.

2. Whether the Tuscarora Nation's fishing rights reserved in the Treaty of Canandaigua of 1794 could be divested by implication by the Seneca Nation in an agreement to which the Tuscarora Nation was not a party.

## TABLE OF CONTENTS

	<i>Page</i>
OPINIONS BELOW .....	1
JURISDICTION .....	1
RELEVANT STATUTORY PROVISIONS .....	1
STATEMENT OF CASE .....	2
I. The Six Nations' Use Rights Were Communal .....	2
II. Three Treaties with the Six Nations .....	4
A. The Treaty with the Six Nations of 1784 (Treaty of Ft. Stanwix) .....	5
B. The Treaty with the Six Nations of 1789 (Treaty of Ft. Harmar) .....	5
C. The Treaty with the Six Nations of 1794 (Treaty of Canandaigua) .....	6
III. Agreement with the Seneca 1797 .....	8
IV. Litigation Below .....	9
REASONS FOR GRANTING WRIT .....	12

I.	The Tuscarora Nation's Fishing Rights Exist Independently of Land Ownership .....	14
A.	The Court Below Departed from This Court's Precedent that Indian Use Rights Are Separate From Land Ownership .....	14
1.	The Tuscarora Nation Reserved Fishing Rights in the Treaty of Canandaigua.....	14
2.	Treaty Fishing Rights Exist Independently From Land Ownership .....	15
B.	The Court Below Ignored Settled Canons of Treaty Construction to Render Use Rights Wholly Dependent Upon Land Ownership.....	17
II.	The Seneca's Sale of the Underlying Land Did Not, and Could Not, Abrogate Tuscarora's Reserved Fishing Rights .....	19
A.	The Sale of Land Does Not Divest Use Rights.....	20
B.	Use Rights May Not Be Extinguished by Implication .....	20
C.	The Tuscarora's Use Rights May Not Be Abrogated Through A Land Sale Agreement They Did Not Participate In .....	22

CONCLUSION .....	25
------------------	----

## TABLE OF CITED AUTHORITIES

*Page*

### Cases

<i>Beck v. Prupis</i> , 529 U.S. 494 (2000) .....	17
<i>Cappaert v. United States</i> , 426 U.S. 128 (1976) .....	21
<i>Confederated Tribes of Chehalis v. State of Washington</i> , 96 F.3d 334 (9th Cir. 1996), <i>cert. denied</i> , 520 U.S. 1168 .....	16
<i>Federal Power Commission v. Tuscarora Indian Nation</i> , 362 U.S. 99 (1960) .....	10
<i>Hynes v. Grimes Packing Co.</i> , 337 U.S. 86 (1949) .....	21
<i>Jones v. Meehan</i> , 175 U.S. 1 (1879) .....	19
<i>Kennedy v. Becker</i> , 241 U.S. 556 (1916) .....	9

<i>Menominee Indian Tribe of Wisconsin v. Thompson</i> , 922 F. Supp. 184 (W.D. Wisc. 1996), <i>aff'd</i> , 161 F.3d 449, <i>cert. denied</i> , 526 U.S. 1066 (1999) .....	16
<i>Menominee Tribe v. United States</i> , 391 U.S. 404 (1968) .....	8, 15, 20, 21
<i>Minnesota v. Mille Lacs Band of Chippewa Indians</i> , 526 U.S. 172 (1999) ....	12, 13, 15, 16, 19, 20, 21, 22, 23
<i>New York Indians v. United States</i> , 170 U.S. 1, 36 (1898). ....	3
<i>Oneida Indian Nation of New York v. New York</i> , 860 F.2d 1145 (2d Cir. 1988), <i>cert. denied</i> , 493 U.S. 871 (1989) .....	5
<i>Oregon Dept. of Fish and Wildlife v. Klamath Indian Tribe</i> , 473 U.S. 753 (1985) .....	15
<i>People ex rel. Ray v. Martin</i> , 294 N.Y. 61 (1945).....	6
<i>People v. Patterson</i> , 2005 N.Y. Int. 99 (N.Y. Ct. App. 2005)..... .....	10, 14, 15, 17, 18, 20, 22, 23, 24

<i>Pecora v. Redeye</i> , 78 Misc.2d 834 (Cattaraugus Co. Ct. 1974).....	14
<i>Seneca Nation of Indians v. New York</i> , 206 F. Supp.2d 448 (W.D.N.Y. 2002), <i>aff'd</i> , 382 F.3d 245 (2d Cir. 2004) .....	3, 6
<i>Shoshone Tribe v. United States</i> , 299 U.S. 476 (1936) .....	24
<i>Six Nations v. United States</i> , 23 Ind. Cl. Comm. 376 (1970) .....	6
<i>Strong v. United States</i> , 31 Ind. Cl. Comm. 89 (1973) .....	3
<i>The New York Indians</i> , 72 U.S. 761 (1866) .....	8
<i>Tlingit &amp; Haida Indians of Alaska v. United States</i> , 389 F.2d 778 (Ct. Cl. 1968).....	16
<i>Tuscarora v. United States</i> , 23 Ind. Cl. Comm. 140 (1970) .....	2
<i>United States v. Creek Nation</i> , 295 U.S. 103 (1934) .....	24
<i>United States v. Sioux Nation</i> , 448 U.S. 371 (1980) .....	24



<i>United States v. Wheeler</i> , 435 U.S. 313 (1978) .....	21
<i>United States v. Winans</i> , 198 U.S. 371 (1905) .....	16, 21
<i>Washington v. Washington Comm'l Passenger Fishing Vessel Ass'n</i> , 443 U.S. 658 (1979) .....	15, 18, 19
<i>Winters v. United States</i> , 207 U.S. 564 (1908) .....	21
<i>Worcester v. Georgia</i> , 31 U.S. 515 (1832) .....	18

## Treaties

Agreement with the Seneca, 7 Stat. 601 (Sep. 15, 1797)..... .....	1, 8, 9, 11, 21, 22, 23
Treaty with the Six Nations, 7 Stat. 15 (Oct. 22, 1784)..... .....	1, 5, 6
Treaty with the Six Nations, 7 Stat. 33 (Jan. 9, 1789) .....	1, 5, 6
Treaty with the Six Nations, 7 Stat. 44 (Nov. 11, 1794)..... .....	1, 2, 6, 10, 12

**Statutes**

28 U.S.C. § 1257 .....	1
------------------------	---

**Other Authorities**

Arthur C. Parker, THE CONSTITUTION OF THE FIVE NATIONS (University of the State of New York, 1916) .....	4
--	---

D. Landy, TUSCARORA AMONG THE IROQUOIS, IN NORTHEAST, (Handbook of North American Indians), (B.G. Trigger, ed.) .....	5
---	---

Robert W. Venables, INTRODUCTION TO THE SIX NATIONS OF NEW YORK: THE 1892 UNITED STATES EXTRA CENSUS BULLETIN (Nick Salvatore, ed., Cornell University Press 1995) .....	3
---	---

Robert W. Venables, <i>Some Observations on the Treaty of Canandaigua</i> , in TREATY OF CANANDAIGUA 1794: 200 YEARS OF TREATY RELATIONS BETWEEN THE IROQUOIS CONFEDERACY AND THE UNITED STATES (G. Peter Jemison and Anna M. Schein, eds. 2000) .....	4
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# TABLE OF APPENDICES

	<i>Page</i>
APPENDIX A — OPINION OF THE COURT OF APPEALS FOR THE STATE OF NEW YORK ENTERED ON JUNE 14, 2005 .....	1a
APPENDIX B — TREATY WITH THE SIX NATIONS, 1784.....	13a
APPENDIX C — TREATY WITH THE SIX NATIONS, 1789.....	17a
APPENDIX D — TREATY WITH THE SIX NATIONS, 1794.....	23a
APPENDIX E — AGREEMENT WITH THE SENECA, 1797.....	32a

## OPINIONS BELOW

The opinion of the New York Court of Appeals is reported at 2005 NY Int. 99. App. A, *infra*. The opinion of the Niagara County Court of June 29, 2004, is not reported. The opinion of the Town of Wilson Justice Court is not reported.

## JURISDICTION

The opinion and judgment of the New York Court of Appeals were entered on June 14, 2005. Justice Ginsberg extended the time within which to file a petition for a writ of certiorari to and including October 27, 2005. This Court has jurisdiction pursuant to 28 U.S.C. § 1257.

## RELEVANT STATUTORY PROVISIONS

1. Treaty with the Six Nations, 7 Stat. 15 (Oct. 22, 1784) (App. B, *infra*);
2. Treaty with the Six Nations, 7 Stat. 33 (Jan. 9, 1789) (App. C, *infra*);
3. Treaty with the Six Nations, 7 Stat. 44 (Nov. 11, 1794) (App. D, *infra*);
4. Agreement with the Seneca, 7 Stat. 601 (Sep. 15, 1797) (App. E, *infra*).